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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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| JAMES M. KINDER,<br><br>Plaintiff,<br><br>vs.<br><br>HARRAH'S ENTERTAINMENT, INC. and DOES 1 through 100, inclusive,<br><br>Defendants. | CASE NO. 07 CV 2226 DMS (AJB)<br><br>Judge: Hon. Dana M. Sabraw<br>Mag. Judge: Hon. Anthony J. Battaglia<br><br>**OPPOSITION OF *SPECIALLY APPEARING* DEFENDANT TO PLAINTIFF'S MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT**<br><br>Date: January 25, 2008<br>Time: 1:30 p.m.<br>Courtroom: 10 |

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## I.

## INTRODUCTION

Plaintiff JAMES M. KINDER ("KINDER") filed a motion for leave to file a first amended complaint with this Court without attaching the proposed first amended complaint to his motion for leave to amend. KINDER failed to provide this Court with any tenable basis for granting his motion. Indeed, KINDER seeks to add various entities as defendants simply because they bear the name "Harrah's" and despite the fact that KINDER has no legal or factual justification for adding these entities to his case. Moreover, as is established more fully in the attached declaration of Michael Kostrinksy, the entities KINDER seeks to add are all foreign entities over whom the Court lacks personal jurisdiction. It is precisely this type of abuse of the judicial process that invariably led to KINDER being deemed a vexatious litigant by the Superior Court of the State of California and which justifies denying this motion and dismissal of this entire action due to KINDER's failure to obtain the required pre-filing order and to post a bond.

## II.

## PERTINENT FACTS

KINDER filed his complaint against *Specially Appearing* Defendant Harrah's Entertainment, Inc. on October 2, 2007. (Exh. 1.) In his complaint, KINDER alleges violations of the Telephone Consumer Protection Act (Exh. 1, at ¶¶ 5-9), California Civil Code § 1770 (Exh. 1, at ¶¶ 10-15), Unfair Business Practices Act (Exh. 1, at ¶¶ 21-23), and an alleged trespass to chattel (Exh. 1, at ¶¶ 16-20.) On November 21, 2007, *Specially Appearing* Defendant Harrah's Entertainment, Inc. ("HARRAH'S"), removed this matter to the United States District Court pursuant to 28 United States Code sections 1332 and 1441 (b). On November 30, 2007, HARRAH'S filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) and (6) because this Court lacks personal jurisdiction over *Specially Appearing* Defendant Harrah's Entertainment, Inc. and due to the failure of KINDER, a vexatious litigant, to obtain a pre-filing order before initiating this action. The motion to dismiss is set for hearing on January 25, 2008.

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On December 28, 2007, KINDER filed the instant motion for leave to amend his complaint to add five additional entities whose names include the word "Harrah's," but KINDER failed to attach his proposed amended complaint to his motion. (Giusso Dec. ¶ 3.) KINDER asks that the Court allow him to add Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc. KINDER provides no explanation (factual or legal) for adding these entities to the case, does not attach the proposed amendment which might explain what he intends to allege against these entities or any viable argument as to why the Court should allow him to amend.

As is more fully set forth in the attached Declaration of Michael Kostrinsky, **none** of the five entities KINDER seeks to add as defendants are subject to jurisdiction in California.[1] These entities are not incorporated in California, do not have offices in California, do not own property in California, do not have employees in California or conduct business in California. (*See*, Kostrinsky Decl., ¶ 3.) Therefore, there is no conceivable basis for KINDER to bring these parties into this case – other than to simply harass them.

## III.

## LEGAL AUTHORITY ON LEAVE TO AMEND

Although, "in the interests of justice," Courts may grant leave to amend a complaint, they are **not** required to grant leave in all cases. (F.R.Civ.P. 15(a); *Acosta-Mestre v. Hilton Int'l of P.R., Inc.*, 156 F.3d 49, 51 (1st Cir. 1998).) Courts properly deny leave to amend where the amendment is filed with dilatory motive, in bad faith, where it will cause an opposing party prejudice, or where the amendment would be futile. (*Forman v. Davis,* 371 U.S. 178, 182 (1962); *Kaplan v. Rose,* 49 F.3d 1363, 1370 (9th Cir. 1994); *Acri v. International Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1399-1400 (9th Cir. 1986); *M/V American Queen v. San*

[1] As argued in the pending Motion to Dismiss.

*Diego Marine Const. Corp.*, 708 F.2d 1483, 1492 (9th Cir. 1983).) The Ninth Circuit has held that it is proper to deny leave to amend where the amendment of a complaint is insufficient in law and would, therefore, be a useless act. (*Gilbertson v. Fairbanks*, 262 F.2d 734, 740 (9th Cir. 1959); *Holmes v. Henderson*, 145 F. Supp. 832, 837 (D. Nev. 1956), *aff'd* 249 F.2d 529 (9th Cir. 1957); *see also Vickery v. Fisher Governor Co.*, 417 F. 2d 466, 470 (9th Cir. 1969); *Baker v. Pacific Far East Lines, Inc.*, 451 F. Supp. 84, 89 (N.D. Cal 1978).)

The test for determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6). Where there are no facts under the amendment to the pleadings which would constitute a valid sufficient claim, leave to amend is properly denied. (*Baker*, 451 F. Supp. at 89.) Moreover, prejudice to the opposing party is the crucial factor in determining whether or not to grant leave to amend a complaint. (*Smith v. Costa lines, Inc.*, 97 F.R.D. 451 (N.D. Cal. 1983).)

**IV.**

**LEAVE TO AMEND SHOULD BE DENIED AS KINDER FAILED TO ATTACH HIS PROPOSED FIRST AMENDED COMPLAINT TO HIS MOTION**

Once a response to a complaint has been filed, the complaint may only be amended by leave of court. (F.R.Civ.P. 15 (a).) Further, Rule 7 (b)(1) requires a motion state its grounds "with particularity." The Court may deny a motion to amend a complaint for failure to submit the proposed amendment. (*See, Zaidi v. Ehrlich*, 732 F.2d 1218, 1220 (5th Cir. 1984); *Bownes v. City of Gary, Indiana*, 112 F.R.D. 424, 425 (N.D. Ind. 1986); *Williams v. Wilkerson*, 90 F.R.D. 168, 170 (E.D. Va. 1981).) "Common sense" dictates that a party seeking leave to amend should accompany his motion with a copy of his proposed amended complaint. (*Bownes v. City of Gary, Indiana*, 112 F.R.D. 424, 425 (N.D. Ind. 1986).)

Without the proposed amendment, this Court and *Specially Appearing* Defendant Harrah's Entertainment, Inc. are forced to speculate regarding the nature of the proposed amendments and the sufficiency of the allegations against each "proposed" party. The only information KINDER provided to the Court and *Specially Appearing* Defendant Harrah's Entertainment, Inc. is a naked contention that he received phone calls promoting various casinos which bear the name Harrah's. KINDER did not provide the Court or *Specially Appearing* Defendants with even the bare minimum information necessary under the liberal federal pleading requirements. (*See*, F.R.Civ.P. 8(a) and (f); and, *Conley v. Gibson* 355 U.S. 41, 47-48 (1957).)

Federal Rule of Civil Procedure 8(a) requires that every complaint set forth (1) a "short and plain" statement of the grounds for jurisdiction; (2) a "short and plain" statement of the claim showing that the plaintiff is entitled relief; and, (3) a demand for judgment. Not only does KINDER fail to provide this information in the form of a proposed amended complaint, but he failed to make any mention of this in his wholly deficient motion for leave to amend.

KINDER's motion is completely silent as to whether this Court would have personal jurisdiction over any of the five entities he seeks to bring into the case as defendants. KINDER's motion fails to set forth any basis for his claim for relief and fails to inform this Court of the judgment he is seeking against these entities. For KINDER to expect this Court to blindly grant his motion is to show complete disregard for due process and the basic tenants of the Federal Rules of Civil Procedure. As such, KINDER's motion for leave to amend should be denied in its entirety.

## V.

## LEAVE TO AMEND SHOULD BE DENIED, AS KINDER'S REQUESTED RELIEF WILL NOT WITHSTAND A MOTION TO DISMISS

This Court should also deny KINDER's motion for leave to add five new entities as defendants to his lawsuit because any such amendment would not survive a motion to dismiss for failure to obtain the requisite pre-filing order and for lack of personal jurisdiction over these entities. As is more fully set forth below, this Court lacks personal jurisdiction over the five foreign entities KINDER proposes to sue (Kostrinsky Decl., ¶ 3), which mandates that KINDER's motion be denied. Courts are justified in denying a motion to amend the pleadings, where the proposed amendment could not withstand a motion to dismiss. (*Glick v. Koenig*, 766 F. 2d 265 (7th Cir. 1985), *Baker*, 451 F. Supp. at, 89; *Gilbertson*, 262 F.2d at 740); *Holmes*, 145 F. Supp. at, 837; *see also*, *Vickery*, 417 F. 2d at 470).)

**A. This Court Lacks Personal Jurisdiction Over The Proposed Entities.**

For the very same reasons this Court lacks personal jurisdiction over *Specially Appearing* Defendant Harrah's Entertainment, Inc.,[2] this Court also lacks personal jurisdiction over Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc., named in plaintiff's Motion to File a First Amended Complaint.

Personal jurisdiction may only be asserted by courts in California in one of two ways – general or specific. (*Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal.4th 434, 444-445 (1996).) A nonresident defendant may be subject to general jurisdiction only if his or her contacts in the forum state are "substantial . . . continuous and systematic." (*Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445-446 (1952); *see also*, *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-415 (1984).) Where a nonresident defendant does not have the requisite substantial and systematic contacts with California to establish general jurisdiction, it may only be subject to the specific jurisdiction of that forum. However, specific jurisdiction cannot be found unless it is shown by **competent evidence** that the defendant has purposefully availed itself of forum benefits and the "controversy is related to or arises out of a defendant's contacts with the forum." (*See*, *Burger King v. Rudzewicz*, 471 U.S. at 472-473 (1985); *Helicopteros*, 466 U.S. at 414.)

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[2] *Specially Appearing* Defendant Harrah's Entertainment, Inc.'s Motion to Dismiss is set for hearing on January 25, 2008.

Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., and HBR Realty Company, Inc., do not have the substantial, continuous, and systematic contacts with California required for this Court to exercise general jurisdiction over these entities. (*Helicopteros*, 466 U.S. at 414-415.) Rather, they are all foreign corporations that are not headquartered in California. (Kostrinsky Dec. ¶ 3.)

KINDER has not and cannot provide this Court with any **competent evidence** to establish the elements necessary for personal jurisdiction. KINDER proposes to name five additional entities which he has undoubtedly found from a basic *Google* search for business entities with Harrah's in its name. An internet search is not evidence and not sufficient to provide a basis for this Court to exercise personal jurisdiction over foreign entities. The entirety of KINDER's "evidence" is incompetent hearing testimony from his attorney who states things on "information" and purports to quote from "public title documents" that are not disclosed, not named, and, not surprisingly, not attached to KINDER's motion. This is no "evidence" at all. (*See*, concurrently filed Objection and Motion to Strike portions of the Declaration of Chad Austin.) KINDER has not provided a shred of competent evidence to establish that any of these entities purposely availed themselves of the benefits or privileges of conducting business in California, nor can he provide any evidence that these entities performed any act in California or have any **case-related contacts.**

Inasmuch as this Court does not have jurisdiction over any of the entities KINDER proposes to name, his amended complaint would not withstand a motion to dismiss and, for these reasons, should properly be denied. (*Glick*, 766 F. 2d at 265.)

**B. Plaintiff's Amended Complaint Cannot Possibly State A Claim For Which Relief Can Be Granted As He Proposes to Name the Wrong Entities.**

In addition to the arguments raised above, KINDER's motion for leave to amend should be denied on the separate grounds that neither Harrah's Operating Company, Inc., Harrah's Marketing Services Corporation, Harrah's License Company, LLC, Harrah's Laughlin, Inc., nor HBR Realty

Company, Inc. owed KINDER a duty of care. None of the entities which are the subject of KINDER's motion for leave to amend his complaint have any relationship whatsoever with KINDER. KINDER has not shown that these entities make telemarketing or other telephone calls to individuals in California using an automatic telephone dialing system, artificial or prerecorded voice. (*See, e.g.*, Kostrinsky Decl., ¶ 3.)

KINDER's motion is silent on this issue as well. KINDER utterly failed to identify how any of the entities he would like to sue owed him a duty. KINDER contends in his motion the five new entities own various casinos throughout the United States and purports that he received telephone calls promoting these casinos. However, for each entity he proposes to name, KINDER failed to state the grounds for **jurisdiction** over these entities; failed to state what **duties were owed** to him; failed to state how he is **entitled to relief**; and, failed to identify his **demand for judgment against these entities.** Without this basic information, KINDER's motion to amend necessarily fails. Not only has KINDER proposed to sue improper entities, he has also failed to allege the most basic facts necessary to a complaint. Any and all claims KINDER might allege against these entities would fail as a matter of law and, consequently, his motion to file a first amended complaint should be denied.

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## VI.

## CONCLUSION

Based on the foregoing, *Specially Appearing* Defendant respectfully requests this Court deny KINDER's motion to file a first amended complaint.

SHEA STOKES ROBERTS & WAGNER, ALC

Dated: January 11, 2008

By: s/Ronald R. Giusso
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